No. 08-20-00239-CV

IN THE EIGHTH DISTRICT COURT OF APPEALS
EL PASO, TEXAS

TEXAS COMMISSION ON ENVIRONMENTAL QUALITY AND THE CITY OF DRIPPING SPRINGS,
Appellants,

v.

SAVE OUR SPRINGS ALLIANCE, INC.,
Appellee.

On Appeal from the 345th District Court of Travis County, Texas
The Honorable Maya Guerra Gamble, Presiding
Cause No. D-1-GN-19-003030

BRIEF OF APPELLANT TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

KEN PAXTON
Attorney General of Texas

BRENT WEBSTER
First Assistant Attorney General

GRANT DORFMAN
Deputy First Assistant Attorney General

SHAWN COWLES
Deputy Attorney General for Civil Litigation

PRISCILLA M. HUBENAK
Chief, Environmental Protection Division

SARA J. FERRIS
Assistant Attorney General
State Bar No. 50511915

ERIN K. SNODY
Assistant Attorney General
State Bar No. 24093056

Environmental Protection Division
Office of the Attorney General
P. O. Box 12548, MC-066
Austin, Texas 78711-2548
(512) 475-4026 | Fax: (512) 320-0911

Attorneys for the Texas Commission on Environmental Quality

Oral Argument Requested

IDENTITY OF PARTIES AND COUNSEL

APPELLANT:	TEXAS COMMISSION ON ENVIRONMENTAL QUALITY
Counsel:	Sara J. Ferris State Bar No. 50511915 Sara.Ferris@oag.texas.gov Erin K. Snody State Bar No. 24093056 Erin.Snody@oag.texas.gov OFFICE OF THE ATTORNEY GENERAL ENVIRONMENTAL PROTECTION DIVISION Post Office Box 12548, MC-066 Austin, Texas 78711-2548 (512) 475-4026 | Fax: (512) 320-0911
APPELLANT:	THE CITY OF DRIPPING SPRINGS (Intervenor at the Trial Court)
Appellate Counsel:	Douglas W. Alexander State Bar No. 00992350 dalexander@adjtlaw.com ALEXANDER DUBOSE & JEFFERSON LLP 515 Congress Avenue, Suite 2350 Austin, Texas 78701-3562 (512) 482-9301 | Fax: (512) 482-9303
Trial and Appellate Counsel	David J. Tuckfield State Bar No. 00795996 david@allawgroup.com Eric B. Storm State Bar No. 24033244 eric@allawgroup.com

	THE AL LAW GROUP, PLLC 12400 West Highway 71, Suite 350-150 Austin, Texas 78738 (512) 576-2481 | Fax: (512) 366-9949
Trial Counsel	Andrew N. Barrett State Bar Number: 01808900 andy@thebarrettfirm.com ANDY BARRETT & ASSOCIATES, PLLC 3300 Bee Cave Road, Suite 650 # 189 Austin, Texas 78746 Telephone: 512-600-3800 Facsimile: 512-330-0499
APPELLEE:	SAVE OUR SPRINGS ALLIANCE, INC.
Counsel:	Kelly D. Davis State Bar No. 24069578 kelly@sosalliance.org William G. Bunch State Bar No. 03342520 bill@sosalliance.org 4701 West Gate Blvd., Bldg. D, Suite 401 Austin, Texas 78745

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GLOSSARY OF ABBREVIATIONS AND TECHNICAL TERMS

Term	Meaning
2SCR	2nd Supplemental Clerk's Record; See also CR, SCR
ALJ	Administrative Law Judge
Application	Application for Texas Pollutant Discharge Elimination System Permit No. WQ0014488003
AR	Administrative Record. Contained within the RR.
COL	Conclusion of Law
CPP	(Continuing Planning Process); document detailing water quality management program for Texas
CR	Clerk's Record; *See also* SCR and 2SCR
DCTLR	The District Court's Letter Ruling (Oct. 29, 2020)
City of Dripping Springs	The City; the Applicant in the TCEQ contested case, Intervenor in District Court, and an Appellant in this appeal.
Commission	Texas Commission on Environmental Quality (TCEQ); Appellant.
Discharge Point	The location where water, run-off, or effluent enters a watercourse (such as a creek or river).
DO	Dissolved Oxygen (Permit Limits 6.0 mg/1 min. DO)
ED	TCEQ's Executive Director
Effluent	A substance that flows out; the treated or untreated liquids that flow out of a water treatment plant, a sewer, or an industrial outfall.
EOC	Explanation of Changes, a section of the Order

FOF	Finding of Fact
IPs	(Procedures to Implement the Texas Surface Water Quality Standards); document explaining and describing the procedures used when applying water quality standards to TPDES permits. The current version for this case is the 2010 IPs.
MOA	Memorandum of Agreement between the EPA and Commission regarding the NPDES system.
Onion Creek	A course of water within the Colorado River Basin. The creek Walnut Springs is a tributary of Onion Creek.
OP	Ordering Paragraph.
Order	The final and appealable order of the Commission in TCEQ Docket No. 2017-1749-MWD signed on March 6, 2019, from which Plaintiff appeals. RR, AR Item 169
Permit	TPDES Permit sought by City of Dripping Springs
PFD	Proposal for Decision issued by SOAH ALJ Craig R. Bennett on November 16, 2018. RR, AR Item 162
Receiving Waters	The body of water into which wastewater or treated effluent flows.
RR	Court Reporter's Record; the Administrative Record is contained within volume 3 of the RR.
Save Our Springs Alliance	SOS; Appellee.
SCR	Supplemental Clerk's Record; *See also* CR and 2SCR
SOAH	State Office of Administrative Hearings

SOS	Save Our Springs Alliance; Appellee.
TCEQ	Texas Commission on Environmental Quality (Commission); Appellant
TN	Total Nitrogen (Permit TN limits 6 mg/L TN)
TP	Total Phosphorus (Permit TP limits 0.15 mg/L)
TPDES	Texas Pollutant Discharge Elimination System
TSWQS	Texas Surface Water Quality Standards, 30 Tex. Admin. Code Chapter 307.
WQMP	Water Quality Management Plan. Used by TCEQ for planning, to control or prevent water quality problems.
Watershed	The land area that drains water to a particular body of water.
Walnut Springs	An unclassified creek in Hays County; the receiving waters in his case.

STATEMENT OF THE CASE

Nature of the Case:	This is an appeal of a final judgment in a suit for judicial review of a state agency order.[1] The Texas Commission on Environmental Quality issued an order under Tex. Water Code Ch. 26, granting the City of Dripping Springs a Texas Pollutant Discharge Elimination System (TPDES) Permit which authorizes the City to discharge treated wastewater into Walnut Springs creek and thereafter, Segment 1427 of Onion Creek. As allowed by the Water Code and the Administrative Procedure Act, Save Our Springs sought judicial review of the order in Travis County District Court.[2] The appeal of the District Court's final judgment was transferred from the Third Court of Appeals to this Court. *See* Tex. R. App. P. 41.3.
Course of Proceedings:	The Travis County District Court held a hearing on the merits on June 25, 2020.
Trial Court:	345th Judicial District Court, Travis County
Presiding Judge:	The Honorable Maya Guerra Gamble.
Trial Court Disposition:	The District Court reversed the agency order.[3]

[1] The Administrative Record (AR) consists of three components—administrative documents, evidentiary exhibits, and transcripts. The Reporter's Record volume 3 (RR) contains the AR, the contents of which have item numbers assigned. Citations to the AR will be to RR, AR Item "X" (example: RR, AR Item 29 (ED's Response to Public Comments) at 1).

[2] CR at 3-26.

[3] CR at 422.

STATEMENT REGARDING ORAL ARGUMENT

TCEQ requests oral argument. This case involves a novel issue in that this is the first case under the Tex. Gov't Code § 2003.047(i-1)-(i-3) prima facie and burden of proof standards. Oral argument may also clarify and explain the record and regulatory scheme supporting the decision.

ISSUES PRESENTED

1. Did TCEQ Genuinely Engage in Reasoned Decision-making When Granting City's TPDES Permit? Does the Permit Granted Under the Commission's Order Comply with Anti-Degradation Tier 2 Standards, Other Applicable Law and Policy? Is the Order Supported by Substantial Record Evidence?

2. Did TCEQ Genuinely Engage in Reasoned Decision-making When Granting City's TPDES Permit? Does the Permit Granted Under the Commission's Order Comply with Anti-Degradation Tier 1 Standards, Other Applicable Law and Policy? Is the Order Supported by Substantial Record Evidence?

3. Did Substantial Evidence Support the Commission's Finding That Public Notice Requirements Were Satisfied? Did TCEQ Genuinely Engage in Reasoned Decision-making?

STATEMENT OF FACTS

This appeal involves the question of whether the City of Dripping Springs (City) should have been granted a Texas Pollutant Discharge Elimination System Permit (TPDES Permit or Permit) by the Texas Commission on Environmental Quality (TCEQ or Commission) or whether the Permit impermissibly authorizes the City to degrade the water within Walnut Springs Creek and Segment 1427 of Onion Creek.

In the underlying administrative proceeding, the City and TCEQ's Executive Director (ED) contended that all state and federal technical and legal requirements were satisfied, while Save our Springs Alliance (SOS) contended that the permit would impermissibly degrade water quality and harm existing aquatic life. The Administrative Law Judge (ALJ) agreed with the City and the ED; the Proposal for Decision (PFD) concluded that "the evidentiary record has demonstrated satisfaction of all applicable requirements and supports issuance of the permit sought."[4] The Commission granted the Permit.[5] SOS sought judicial review, the District Court reversed TCEQ's Order, and the Commission now appeals.

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[4] RR, AR Item 162 (PFD) at 45. Hereinafter, "PFD."

[5] *See* RR, AR Item 169 (Order) at 1, 16. Hereinafter, "Order."

The Statutory and Regulatory Scheme

This is a water quality case[6] involving federal and state laws protecting water quality while also providing for wastewater needs and the use and enjoyment of water by humans and wildlife.

Federal

Under Section 301(a) of the federal Clean Water Act, a person cannot discharge a pollutant into a water of the United States except as allowed under the Act[7] including section 402, which establishes the framework for the National Pollutant Discharge Elimination System (NPDES). Under this system, the United States Environmental Protection Agency (EPA), and any state to which EPA has delegated its authority, can issue a permit allowing a discharge that complies with requirements designed to minimize the discharged effluent's impact on the receiving water's uses. [8]

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[6] *See* 30 Tex. Admin. Code § 307.1; Tex. Water Code § 26.003.

[7] 33 U.S.C. § 1311(a).

[8] 33 U.S.C. § 1342 (a)(1)(b), 33 U.S.C. § 1251(a)(2).

Texas

EPA has delegated NPDES authority to the State of Texas.[9] The Texas Legislature authorizes the Texas Commission on Environmental Quality (TCEQ or Commission) to administer the State's wastewater discharge permitting program in conjunction with the federal program as the Texas Pollutant Discharge Elimination System (TPDES) program, predominantly under chapter 26 of the Texas Water Code and through title 30 of the Texas Administrative Code. Under Texas Water Code § 26.121, no person may discharge wastewater into water in the state except as authorized by TCEQ in a TPDES permit.[10] The Commission's regulations governing TPDES permitting are found in Title 30 of the Texas Administrative Code.

In the administrative proceeding, the Commission's Order included Conclusions of Law indicating that granting the City's TPDES Permit is consistent with Title 30 and the over-arching goal of protecting water quality because the permit contains sufficient provisions to prevent nuisance odors; protect groundwater, the health of the requesters and

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[9] *See, e.g.*, Tex. Water Code § 26.028(d)(3) (requiring notice and a public meeting opportunity for NPDES permits in compliance with NPDES program requirements).

[10] Water in the State is defined in Tex. Water Code § 26.001(5).

wildlife in the area, the uses of the receiving waters (including use and enjoyment of requestor's property); will not violate the aesthetic parameters of 30 Tex. Admin. Code § 307.4(b); and will comply with the applicable antidegradation requirements.[11,12]

TCEQ's TPDES Permit Process

Under the Texas Water Code, a person obtains authorization to discharge by applying for a wastewater discharge permit.[13] As noted above, the TPDES permit requirements are embodied in TCEQ's rules which are found in Title 30 of the Texas Administrative Code. TCEQ's regulations contemplate thorough review by ED staff, require detailed information from the applicant, and provides for three notices and opportunity for public input.[14] The ED staff checks the application for

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[11] Order at COLs 8–14, 16, 18; *See* 30 Tex. Admin. Code ch. 307, §§ 307.1, 307.4, and 307.5(b).

[12] *See* FOFs 92–94. FOF 92 lists these protections: (a) compliance with TSWQS and 30 Texas Administrative Code chapter 213, Subchapter A; (b) effluent requirements that are more stringent than the Edwards Aquifer Recharge Rule; (c) effluent requirements that are more stringent than the rules pertaining to Onion Creek and its tributaries found at 30 Texas Administrative Code § 311.43(a)); (d) the existing karst ability to clean water; (e) dilution, evapotranspiration, and other natural processes; and (t) dispersion, sorption, microbial degradation, and chemical processes.

[13] Tex. Water Code § 26.027(a)–(b).

[14] *See e.g.* RR, AR Item 1 (City's Application); 30 Tex. Admin. Code §§ 39.551 (Notices); 50.133 (ED Action on Application); 55.154 (Public Meeting); and 55.156 (Public Comment Processing).

completeness, notifying the Applicant if additional information must be provided. Once the ED finds the application to be administratively complete, the Applicant must provide Notice of Receipt of Application and Intent to Obtain Permit.[15]

The ED staff also reviews evaluates the technical aspects of the application. The application is lengthy (typically over 100 pages) and requires detailed information. During this process, the ED contacts the applicant for additional information as needed. If the application is declared technically complete, staff will prepare a draft permit, technical summary or fact sheet for the application, and public notice. After the technical review of the application is complete, the ED issues a preliminary decision and the draft permit is sent to EPA for their review and approval. Then the second notice is published[16] informing the public that TCEQ has prepared a draft wastewater permit and providing instructions for commenting on the application. The public may provide comments or request a public meeting or hearing on the application.[17]

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[15] 30 Tex. Admin. Code § 39.551(b).

[16] 30 Tex. Admin. Code § 39.551(c).

[17] *See* 30 Tex. Admin. Code §§ 55.154, 55.156.

After public comment is closed, the ED staff responds to public comments.[18] If the permit is ultimately granted, this Response to Comments becomes part of the final Commission order: The Commission "shall consider all timely public comment in making its decision and shall either adopt the executive director's response to public comment in whole or in part or prepare a commission response."[19] After the ED responds to public comments, a motion can be filed requesting reconsideration, or affected persons may request a contested case hearing. The Commission may grant either request; if the request for contested case hearing is granted, a third notice is required under 30 Tex. Admin. Code § 39.551(f). When granting a request for a contested case hearing, the Commission will specify the number and scope of the specific factual issues referred to SOAH.[20]

The City's TPDES Permit was shaped in part by input from the public and affected persons.

In the underlying proceedings, the City's application spent over two years in the administrative process prior to being referred to SOAH for a

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[18] 30 Tex. Admin. Code § 39.420.

[19] 30 Tex. Admin. Code § 50.117(f); *See, e.g.*, Order at OP 3.

[20] 30 Tex. Admin. Code § 55.211.

contested case hearing on twelve issues.[21] During the administrative process, the ED staff, the EPA,[22] and the public weighed in on the application (1,087 comments were filed with TCEQ), and revisions were made reflecting the comments received and the input from the EPA.[23]

In addition to the revisions made during the permit review and processing stage, further revisions were made after referral to SOAH as a result of negotiation and settlement with several parties.[24] After considering the twelve issues referred to SOAH for hearing, and in light of the evidence and argument presented by the parties, SOAH issued a PFD recommending that the Commission approve the application and issue the TPDES permit.[25] The PFD specifically concluded that the "evidentiary record demonstrated satisfaction of all applicable requirements and supports issuance of the permit sought."[26] TCEQ

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[21] *See* PFD at 1–3 (Nov. 16, 2018).

[22] RR, AR Item 33; *See* RR, AR Items 37 (Response), 39 (Changes to Draft Permit), and 40 (Withdrawal of Objection).

[23] *See* RR, AR Items 39, 47, and 48 (Changes to Draft Permit); RR, AR Item 49 (ED's Response to Public Comments).

[24] *See* RR, AR Item 114 (Order No. 12, Granting Motion to Admit Evidence and to Amend the Draft Permit); PFD at 2.

[25] RR, AR, Item 162 (PFD) at 1.

[26] *Id.* at 45.

subsequently adopted the PFD with few changes and the ED's Reply to Public Comments.

Standard of Review

A person aggrieved by a decision or order of the Commission is entitled to judicial review under the substantial evidence rule.[27] *See* Tex. Water Code § 5.351; Tex. Gov't Code § 2001.021. The statutory standard of review is as follows: If the law authorizes review of a decision in a contested case under the substantial evidence rule or if the law does not define the scope of judicial review, a court may not substitute its judgment for the state agency's on the weight of the evidence on questions committed to agency discretion.[28] However, the court: (1) may affirm the agency decision in whole or in part; and (2) shall reverse or remand the case for further proceedings if substantial rights of the appellant have been prejudiced because the administrative findings, inferences, conclusions, or decisions are: (A) in violation of a constitutional or

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[27] *Tex. Comm'n on Envtl. Quality v. Bonser-Lain*, 438 S.W.3d 887, 894–95 (Tex. App.—Austin 2014, no pet.) *citing Hooks v. Tex. Dep't of Water Res.*, 611 S.W.2d 417, 419 (Tex. 1981) ("The judicial review provisions of the APA and the Water Code should be read in conjunction and harmony with each other.").

[28] In fact, the agency is the sole judge of the weight of the evidence and the credibility of the witnesses. *Central Power & Light Co. v. Pub. Util. Comm'n*, 36 S.W.3d 547, 561 (Tex. App.—Austin 2000, pet. denied).

statutory provision; (B) in excess of the agency's statutory authority; (C) made through unlawful procedure; (D) affected by other error of law; (E) not reasonably supported by substantial evidence considering the reliable and probative evidence in the record as a whole; or (F) arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion. Tex. Gov't Code § 2001.174.

Essentially, § 2001.174 is a rational-basis test to determine, as a matter of law, whether an agency's order finds reasonable support in the record. *See Tex. Health Facilities Comm'n v. Charter Med.–Dallas, Inc.*, 665 S.W.2d 446, 452–53 (Tex. 1984). "The true test is not whether the agency reached the correct conclusion, but whether some reasonable basis exists in the record for the action taken by the agency." *Id.* at 452.

In conducting substantial evidence review, courts must determine whether the evidence in its entirety is such that reasonable minds could have reached the same conclusion as the agency in the disputed action. *Coal. for Long Point Preservation v. Tex. Comm'n on Envtl Qual.*, 106 S.W.3d 363, 366 (Tex. App.—Austin 2003, pet. denied). The court may not substitute its judgment for that of the agency and may consider only the record on which the agency based its decision. *Id.* "We presume that

the agency's findings, inferences, conclusions, and decisions are supported by substantial evidence, and the burden is on the appellant to demonstrate otherwise." *Dyer v. Tex. Comm'n on Envtl Qual.*, No. 03-17-00499-CV, 2019 WL 5090568, at *5 (Tex. App.—Austin Oct. 11, 2019, pet. filed).

Although substantial evidence is more than a mere scintilla, the evidence in the record may actually preponderate against the decision of the agency and yet amount to substantial evidence. *Charter Med.–Dallas, Inc.*, 665 S.W.2d at 452. Moreover, a reviewing court is not bound by the reasons given by an agency in its order, provided there is a valid basis for the action taken by the agency. *R.R. Comm'n of Tex. v. City of Austin*, 524 S.W.2d 262, 279 (Tex. 1975). The issue for the reviewing court is not whether the agency reached the correct conclusion, but rather whether there is some reasonable basis in the record for its action. *City of El Paso v. Public Util. Comm'n*, 883 S.W.2d 179, 185 (Tex. 1994).

Under § 2001.174 judicial review, the court "must remand for arbitrariness if we conclude that the agency has not genuinely engaged in reasoned decision-making." *Heritage on the San Gabriel Homeowners Assoc. v. Tex. Comm'n on Envtl. Qual.*, 393 S.W.3d 417, 423 (Tex. App.—

Austin 2012, pet. denied) (citations omitted). The court can find an administrative agency's decision is arbitrary or results from an abuse of discretion only if the agency:

(1) failed to consider a factor the legislature directs it to consider;[29]

(2) considers an irrelevant factor;[30]

(3) weighs only relevant factors that the legislature directs it to consider but still reaches a completely unreasonable result;[31]

or

(4) fails to follow the clear, unambiguous language of its own regulation.[32]

Statutory Construction

Matters of statutory construction are reviewed de novo. *See Texas Mun. Power Agency v. Pub. Util. Comm'n*, 253 S.W.3d 184, 192 (Tex. 2007). When construing a statute, the primary objective is to ascertain and give effect to the Legislature's intent. *See Tex. Dep't of Protective and Reg. Servs. v. Mega Child Care, Inc.*, 145 S.W.3d 170, 176 (Tex. 2004). The court first looks to the express statutory language. *See*

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[29] *City of El Paso v. Public Util. Comm'n*, 883 S.W.2d 179, 184 (Tex. 1994).

[30] *Id.*

[31] *Id.*

[32] *Pub. Util. Comm'n v. Gulf States Utils.*, 809 S.W.2d 201, 207 (Tex. 1991).

Galbraith Eng'g Consultants, Inc. v. Pochucha, 290 S.W.3d 863, 867 (Tex. 2009). However, the court considers "the entire act and not just isolated portions." *20801, Inc. v. Parker*, 249 S.W.3d 392, 396 (Tex. 2008). Additionally, courts presume that the legislature chooses a statute's language with care, including each word chosen for a purpose, while purposefully omitting words not chosen. *In re M.N.*, 262 S.W.3d 799, 802 (Tex. 2008).

Further, as noted in *Dyer*, the Court will "generally uphold an agency's interpretation of a statute it is charged by the Legislature with enforcing, 'so long as the construction is reasonable and does not contradict the plain language of the statute.'" *Dyer*, 2019 WL 5090568 at *5 (*citing Railroad Comm'n v. Texas Citizens for a Safe Future & Clean Water*, 336 S.W.3d 619, 625 (Tex. 2011)). When an agency's interpretation is reasonable and in harmony with the statutory scheme, courts should accept it even if another reasonable interpretation exists. *City of Plano v. Pub. Util. Comm'n*, 953 S.W.2d 416, 421 (Tex. App.—Austin 1997, no writ). This is particularly true where the statute is ambiguous due to the complexity of the subject matter. *Id. (citing Tex. Ass'n of Long Distance Tel. Cos. (TEXALTEL) v. Pub. Util. Comm'n*, 798

S.W.2d 875, 884 (Tex. App.—Austin 1990, writ denied). Also, an agency's rules are construed in the same manner as statutes. *Rodriguez v. Serv. Lloyds Ins. Co.*, 997 S.W.2d 248, 254 (Tex. 1999). The primary objective is to give effect to the Commission's intent. *Id.*

Under the substantial evidence rule, an appellate court conducts its substantial evidence review independently, "governed by the same analysis as in the district court" but "without deference to the district court's judgment." *Jenkins v Crosby Indep. Sch. Dist.*, 537 S.W.3d 142, 148-149 (Tex. App.—Austin 2017, no pet.). Under these standards, the court should affirm the Commission's Order. The Commission's Order granting the City's Permit is reasonable, supported by record evidence, made considering the factors required by rule and statute, reasonably interprets its own rules, and is consistent with Commission policy, the Water Code and the complex regulatory scheme.

BURDEN OF PROOF GOVERNING THIS CASE

The burden of proof in a Texas Pollution Discharge Elimination System (TPDES) permit proceeding "is on the moving party by a preponderance of the evidence. 30 Tex. Admin. Code § 80.17(a). In permit application proceedings, including for TPDES, the overall burden

of proof on the contested case belongs to the applicant because the applicant is the party seeking affirmative relief. *See Boaz v. Harris,* 30 S.W.2d 810, 811 (Tex. App.—Fort Worth 1930, no writ); *Cameron Compress Co. v. Kubecka,* 283 S.W. 285, 286 (Tex. Civ. App.—Austin 1926, writ ref'd). (The burden of proof rests upon the party who holds the affirmative of an issue or proposition of fact. The general test in determining who has the affirmative of an issue is "which party would be successful if no evidence at all were given."). There are two aspects to the burden of proof: the burden of production and the burden of persuasion. The burden of persuasion does not shift but remains with the same party for the entire case. *Boaz v. Harris,* 30 S.W. 2d 810, 811; 35 Tex. Jur. 3d, Evidence § 109 (April 2020 Update).

While the burden of persuasion stays with the applicant, the burden of production does not. This burden may shift from party to party during the case and is the burden of producing, or going forward with, evidence in order to make or meet a prima facie case. *Boaz v. Harris,* 30 S.W.2d 810, 811; *see Tex. Parks & Wildlife Dep't v. Dearing,* 240 S.W.3d 330, 355–56 (Tex. App.—Austin 2007, pet. denied).

The establishment of a prima facie case plays a role in determining which party has the burden of production. Prima facie evidence is evidence that suffices for proof of a particular fact until it is contradicted and overcome by other evidence. *Dodson v. Watson,* 110 Tex. 355, 358, 220 S.W. 771, 772 (1920). The prima facie standard requires the production of enough evidence to support a rational inference that the allegation of fact is true. *See E.I. DuPont de Nemours & Co.,* 136 S.W.3d 218, 223 (Tex. 2004) (orig. proceeding). If a prima facie case is established, the burden of production shifts to the opponent. However, if the plaintiff fails to establish a prima facie case, the defendant is under no obligation or duty to produce any evidence. *Lykes Bros.–Ripley S.S. Co. v. Pluto,* 146 S.W.2d 414, 416 (Tex. App.—Galveston 1941, writ dism'd judgm't cor.).

In TPDES permit application contested cases, the Texas Government Code and the Commission's rules specify what establishes a prima facie demonstration that the draft permit "meets all state and federal legal and technical requirements" and if issued, would protect human health and safety, the environment, and physical property. Tex. Gov't Code § 2003.047(i-1)–(i-3); 30 Tex. Admin. Code § 80.117(c). The

evidence which establishes the statutory prima facie case is expressly identified in the Commission's rules:

- Certified copies of the executive director's (ED's) final draft permit, including any special provisions or conditions;
- ED's preliminary decision or decision (as applicable);
- The summary of the ED's technical review of the application;
- The compliance summary of the applicant;
- Copies and affidavits of the public notices relating to the application;
- Any agency document the ED determines necessary to reflect the administrative and technical review of the application; and
- The application, including any revisions to the original submittal.

30 Tex. Admin. Code §§ 80.17(c)(1), 80.118(a), and 80.118(c)(1)-(2); *See* Tex. Gov't Code § 2003.047(i-1); 30 Tex. Admin. Code § 80.117(c).

In Texas, in order to defeat a prima facie case, the opponent must meet the weight of the evidence provided and once met, the party with the burden of proof must prove its case by a preponderance of the evidence. *Koppe v. Koppe,* 57 Tex. App. 204, 210, 122 S.W. 68, 71–72 (Tex. App.—Galveston 1909, no writ). The general rule was stated in *Clark v. Hiles,* 67 Tex. 141, 2 S.W. 356 (1886), where the Court considered an appeal of a boundary dispute in which the question presented dealt with

the burden of proof and what shifts when a plaintiff has made out a prima facie case. *Id.* at 148, 360. The Court stated that "the burden of proof 'remains on a party affirming a fact in support of his case, and does not change in any aspect of the cause, though the *weight of evidence may shift from side to side,* according to the nature and strength of the proof offered in support or denial of the main fact to be established.'" *Id.* at 360, 148 (citations omitted) (emphasis added).

In the TPDES permit context, once the applicant has established a prima facie case, the Texas Government Code and the Commission's rules have specified what an opposing party must present in order to meet its burden of going forward or burden of production: "evidence regarding the referred issues demonstrating that the draft permit violates a specifically applicable state or federal legal or technical requirement." 30 Tex. Admin. Code §§ 80.17(c)(2), .117(c)(3); *see* Tex. Gov't Code § 2003.047(i-2).

Once an opposing party has made its demonstration, if the prima facie case is successfully rebutted for one or more requirements, then the burden of production or going forward returns to the applicant to prove its case by a preponderance of the evidence. *Entergy Gulf States, Inc. v.*

Pub. Util. Comm'n, 112 S.W.3d 208, 215 (Tex. App.—Austin 2003, pet. denied). In TPDES contested cases, the Texas Government Code and the Commission's rules provide that if a party rebuts the presumption created by the prima facie case, "the applicant and the executive director may present additional evidence to support the draft permit." Tex. Gov't Code § 2003.047(i-3); *see* 30 Tex. Admin. Code § 80.17(c)(3). Under these standards, when looking at the totality of the evidence, the permit is granted if the evidence preponderates in favor of the application.

SUMMARY OF ARGUMENT

This Court should reverse the District Court's final judgment and render judgment affirming the Commission's order. SOS raised no issue showing agency error. Under the substantial evidence rule and the burden of proof standards at play in this case, SOS's claim that TCEQ committed reversible legal error fails. City's proposed Permit was the product of a comprehensive administrative review that included vetting by the EPA and significant public participation. In the contested case, the proposed permit was supported by credible expert testimony and a prima facie demonstration that all state and federal technical and legal requirements are satisfied. In contrast, SOS presented a flawed case that

failed to overcome the prima facie demonstration that the draft permit met all applicable legal and technical requirements, and which included witness testimony that was not reliable for the issues presented. Rather than providing evidence or even raising a genuine suspicion that the draft permit violates a specifically applicable state or federal legal or technical requirement, SOS chose instead to champion alternate standards or lodge challenges without proof. SOS also misread key provisions of the Commissions regulations.

Ultimately, the ALJ and the Commission were faced with weighing the evidence and assessing the credibility of the witnesses—matters which are the exclusive province of TCEQ under Texas law. The Commission did so and determined that based upon the record, the City should be granted a Permit. The Commission engaged in reasoned decision-making and its Order is supported by substantial evidence.

On judicial review, rather than adhering to the standard of review under the substantial evidence rule, the District Court impermissibly stepped into the shoes of the trier of fact and reweighed the evidence and the credibility of the witnesses while also wholly ignoring the new prima facie standards applicable to the case. Applying the standards for judicial

review and burden of proof, this Court should reverse the District Court and affirm the Commission's Order.

ARGUMENT

I. TCEQ Genuinely Engaged in Reasoned Decision-Making When Granting the City's TPDES Permit. The Permit Complies with Anti-Degradation Tier 2 Standards and Other Applicable Law and Policy, and the Commission's Order Granting the Permit is Supported by Substantial Record Evidence.

When granting the City's Permit, TCEQ acted reasonably, based upon substantial evidence, and in accordance with applicable law, including the state's policy of maintaining (rather than degrading) water quality. More specifically, and contrary to the District Court's ruling, TCEQ correctly applied its EPA-approved water quality and anti-degradation policies, including the Tier 2 antidegradation standards, when granting the City's TPDES Permit. *See* 2SCR, Letter Ruling (DCTLR) at 2, 8.[33]

A. The Order is Consistent with Water Quality and Antidegradation Policies.

The Commission "has the sole and exclusive authority to set water quality standards for all water in the state."[34] Under this authority, the Commission's antidegradation policy is established by 30 Tex. Admin.

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[33] For CR, SCR, and 2SCR, page references are to the cited document.

[34] Tex. Water Code § 26.023.

Code § 307.5(b), in harmony with Texas Water Code § 26.003.[35] Section 26.003 provides for maintaining "the quality of water in the state consistent with the public health and enjoyment, the propagation and protection of terrestrial and aquatic life, and the operation of existing industries, taking into consideration the economic development of the state . . . ." Under this general water quality policy, Section 307.5(b) includes three tiers of water quality under the antidegradation policy, two of which are at issue:

> **Tier 1.** Existing uses and water quality sufficient to protect those existing uses must be maintained . . . .
>
> **Tier 2.** No activities subject to regulatory action that would cause degradation of waters that exceed fishable/swimmable quality are allowed . . . .

30 Tex. Admin. Code § 307.5(b). The Commission's antidegradation policy also defines terms within the Tiers. Under Tier 2, "degradation" is defined as a lowering of water quality by more than a de minimis extent, but not to the extent that an existing use is impaired. *Id.* at (b)(2). Tier 2's provisions also clarify that "[w]ater quality sufficient to protect

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[35] TCEQ has general jurisdiction over the state's water and water quality program, including the issuance of permits, enforcement of water quality rules, standards, orders, and permits, and water quality planning. Tex. Water Code §§ 5.013(a)(1), (3).

existing uses must be maintained," and defines "Fishable/swimmable waters" as "waters that have quality sufficient to support propagation of indigenous fish, shellfish, terrestrial life, and recreation in and on the water." *Id.* at (b)(2). Consistent with these standards and definitions, TCEQ considered the antidegradation evidence and argument, determined that the policy had been followed, and that the City's Permit should be granted.[36]

B. The District Court erred by accepting meritless claims of error.

In District Court briefing, SOS asserted that TCEQ committed four errors related to antidegradation when granting the City's Permit:

1. TCEQ "misapplied the anti-degradation policy to TP and TN because the agency ignored the plain meaning of de minimis and concluded Tier 2 was met without making underlying factual findings to support its decision."
2. TCEQ ignored substantial evidence in finding that "the massive increases of TP and TN would protect and maintain water quality in compliance with Tier 2 anti-degradation review."[37]
3. TCEQ misapplied anti-degradation policy to dissolved oxygen by focusing "only on whether DO levels to support existing uses would be maintained, collapsing Tier 2 review

[36] Order at FOFs 77–91.

[37] City's Permit effluent limitations: 0.15 mg/L total phosphorus, 6 mg/L total nitrogen, and 6.0 mg/1 minimum dissolved oxygen (DO); RR, AR Item 177 at Tab B, (pp. 0002 to 0004).

into Tier 1 and failing to examine whether DO levels would be reduced beyond a de minimis extent."

4. TCEQ acted arbitrarily by basing its determination that the Permit would not violate [TSWQS] on non-statutory criteria—the [relative] stringency of the permit . . . .

CR, Plaintiff's Brief at 30–31; *see* 2SCR, DCTLR at 6, 8. The District Court erred in accepting these assertions which fail to support a reversal of the Commission's Order.

1. The PFD and Commission properly applied the rule's definition of degradation to the quality of water.

Contrary to the District Court ruling, TCEQ acted correctly in applying the definition of degradation found in 30 Tex. Admin. § 307.5(b)(2) to the quality of water rather than to the individual pollutant components as advocated by SOS. 2SCR, DCTLR at 8. "Degradation" under Tier 2 is defined by rule as the lowering of water quality by more than a de minimis extent, but not to the extent that an existing use is impaired. 30 Tex. Admin. § 307.5(b)(2). It is SOS and the District Court—not the Commission—who misapply the degradation definition by interpreting the "by more than a de minimis extent" language as applying to each chemical element rather than to the water's quality. *See* 2SCR, DCTLR at 8. However, the District Court's interpretation is inconsistent with express language of Title 30 of the

Tex. Admin. Code and departs from TCEQ's well-established and EPA-approved approach to CWA compliance. The District Court acknowledged in its ruling that TCEQ has not adopted numeric nutrient water quality standards,[38] but found that TCEQ erred by not having nutrient-by-nutrient underlying factual findings, dismissing the fact that the Commission's rules and procedures have been reviewed by the EPA for compliance with the CWA. Given the plain language of the Tier 2 rule, the District Court apparently treated SOS's argument as an attack on the rule itself. However, the Court did not declare the rule invalid; and, if not invalid, the unambiguous language of the rule should be enforced, and the Commission's Order affirmed.

While SOS may have raised a question as to whether the change in the TP or TN level was more than a de minimis change in TP or TN because of where baselines were set, SOS failed to demonstrate that the change in TP or TN necessarily degrades water quality itself under Tier 2 standards. For example, even if background TP levels were to increase by clearly more than a de minimis percentage, the impact on the water body's quality from such a change in TP may be negligible, because TP

[38] CR, DCTLR at 5, 10.

levels both before and after any increase may be extremely low.[39] Such is the case with the TP levels at issue. During the administrative hearing, SOS cross-examined City witness Dr. Miertschin who testified that the "background level" for phosphorous in this case is often below detection limits.[40] In other words, the "background level" of TP is often lower than what is measurable.

The pertinent question is not whether there was any change in the individual pollutant, but whether the change affected water quality. As the PFD concluded, a suspected increase in TP or TN levels, standing alone without additional evidence of its specific impact, does not equate to a lowering of water quality.[41] SOS did not demonstrate what impact on water quality would likely result from the projected change in TP and TN levels. Simply put, SOS failed to demonstrate that the quality of the receiving waters would be degraded and thus failed to rebut the prima facie demonstration that the draft permit meets all state and federal legal and technical requirements.

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[39] PFD at 25.

[40] RR, AR Item 285 (Tr. at 287).

[41] PFD at 24.

Additionally, the District Court erred in accepting SOS's argument that the Commission's decision does not have underlying factual findings to support its decision that Tier 2 standards were met. CR, DCTLR at 10. SOS and the District Court are wrong—the Commission's Order is supported by underlying findings of fact sufficient to serve the overall purpose of informing the parties and the courts of the basis for the agency's decision, including with regard to Tier 2 standards.

Texas law makes clear that underlying facts do not have to conform to some rigid model. In *Goeke v. Houston Lighting & Power Co.*, the Supreme Court of Texas stated: There is no precise form for an agency's articulation of underlying facts, and courts will not subject an agency's order to some "hypertechnical standard of review." 797 S.W.2d 12, 15 (Tex. 1990) (*citing State Banking Bd. v. Allied Bank Marble Falls*, 748 S.W.2d 447, 449 (Tex. 1988)). The Court continued, explaining that, "[w]hat is important is that the findings serve the overall purpose evident in the requirement that they be made—i.e., they should inform the parties and the courts of the basis for the agency's decision so that the parties may intelligently prepare an appeal and so that the courts may properly exercise their function of review." *Id.*

Further, while SOS disagrees particularly with the Order's FOFs 85 and 90, SOS overlooks related FOFs 77–84 and 86–89, which also address the Tier 2 antidegradation analysis.[42] These findings have gone unchallenged by SOS but provide further support for the Commission's decision to grant the City's Permit.[43]

Moreover, the PFD adopted by the Commission provides additional support for the order: "The [PFD] provides . . . underlying reasoning for those finding and conclusions incorporated into TCEQ's final order." 2SCR, DCTLR at 9. Also, the ED's Response to Public Comments was incorporated by reference as part of the Order and provides additional support.[44] TCEQ's Order is supported by substantial record evidence that is reflected in its findings and is the result of a genuine exercise in reasoned decision-making. Accordingly, this Court should reverse the District Court's ruling and reinstate the Commission's Order in all respects.

2. The Commission's decision is not guided by a mere checklist but is instead based upon the comprehensive water quality regulatory

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[42] Order at FOFs 77–90.

[43] Additionally, there are findings related to Tier 2 analysis under other subheadings, such as FOFs 28–30.

[44] *See* Order at OP 3; RR, AR Item 49 (ED's Response to Public Comments).

scheme and the analysis conducted pursuant to the applicable regulations.

The District Court erred by accepting SOS's argument that the Commission has converted water quality analysis to a ministerial act:

> [W]e note again TCEQ's disturbing finding that the substantive standard of preventing degradation of our nation's waters under both Tier 1 and Tier 2 is just a matter of following a procedural guidance document. . . . the plain language of the rule and the Act cannot be trumped by an agency checklist or a discharge limit that does not prevent degradation.

CR Plaintiff's Brief at 32–33; *see* 2SCR, DCTLR at 8 ("following the TCEQ's checklist of procedures for anti-degradation does not assure compliance with these substantive standards."). TCEQ disagrees with these statements for several reasons. First, the District Court and SOS presume that the discharge limits do not prevent degradation. 2SCR, DCTLR at 6. However, there is no basis for this presumption. The evidence comprising the prima facie case and the testimony (including analysis and data) from the ED's and City's expert witnesses establish just the opposite.

For example, the testimony of ED witness and aquatic scientist, Lili Murphy, laid out the criteria she used to conduct the review and analysis

of the proposed TPDES permit.[45] Ms. Murphy explained that TCEQ's 2010 Procedures to Implement the Texas Surface Water Quality Standards or "IPs" explain and describe the procedures that the ED uses when applying water quality standards to permits issued under the TPDES program.[46] The IPs describes procedures for performing specific water quality reviews and considerations when making final determinations and permit recommendations.[47] A copy of the IPs was included in the record as part of ED Witness Ms. Murphy's testimony as Exhibit ED-LM-3.[48] ED Witness Ms. Murphy further confirmed that she used the IPs "to determine water quality uses and associated criteria, evaluate water quality impacts, and perform antidegradation review."[49] The result of Ms. Murphy's review and analysis was that in her opinion, the Tier 1 and the Tier 2 anti-degradation review of the proposed discharge complied with the TSWQS (Ch. 307) and the IPs.[50]

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[45] AR Item 255 (Murphy Prefiled).

[46] The 2010 IPs was the version most recently reviewed and approved by the EPA. RR, AR Item 255 (Murphy Prefiled) at 7.

[47] RR, AR Item 255 (Murphy Prefiled) at 7.

[48] RR, AR Item 257 (IPs).

[49] RR, AR Item 255 (Murphy Prefiled) at 8; *see Id.* at 8–13.

[50] RR, AR Item 255 (Murphy Prefiled) at 30:25–28 and 31:23–26.

Further, the IPs utilized in Ms. Murphy's analysis are an integral part of the Commission's surface water quality program and the comprehensive federal-state regulatory scheme, and are specifically referenced within the TSWQS, along with express acknowledgment that the IPs are approved by TCEQ and EPA. *See* 30 Tex. Admin. Code § 307.2(e). In fact, the Memorandum of Agreement (MOA) between the EPA and TCEQ regarding the federal (NPDES) system explains that the IPs:

- Describe how Texas water quality standards are implemented;
- Is maintained consistent with 40 CFR § 130.5(b)(6); and
- Is part of the Commission's 40 CFR § 130.5(c) Continuing Planning Process (CPP).

MOA between TNRCC and U.S. EPA at 6, Item 14 (Sep. 14, 1998) (Appendix Tab 11).

Correspondingly, the Continuing Planning Process (CPP) describes in detail the State's water quality management program and explains how the Commission implements effective programs to prevent, control, and abate water pollution. CPP at 1 (Appendix Tab 10). The CPP is required by the Clean Water Act and is approved by both the Commission and the EPA to ensure consistency with the CWA and federal regulations. CPP

at 1; *see* 40 CFR 130.5. The CPP's purpose "is to demonstrate that the program requirements *and methods employed* by the Commission will protect and maintain water quality for the benefit of the entire State. CPP at 1 (emphasis added). One part of the CPP details the water quality management plan (WQMP) update process, which is used for planning purposes to control or prevent pollution and contemplates the WQMP update process working in tandem with TPDES Permitting. *See* CPP at 44–48.

Further, the CPP explains that, "[w]hen technology-based effluent limitations alone cannot adequately protect surface water quality, the [Commission] applies water-quality based effluent limitations in a permit. *Id.* at 38. "Series 23" of the CPP relates to implementation and describes in detail how water-quality based effluent limitations are derived. *Id.* at 38. Within Series 23 of the CPP, the EPA acknowledges the IPs as being part of the comprehensive permitting program--stating that the "program for water-quality based permitting is presented in detail in a separate document entitled [IPs]." CPP at 105. Series 23 further explains that the Commission "has developed a comprehensive permitting program to ensure that permitted discharges of treated

wastewater will protect instream water quality, as defined by the Texas Surface Water Quality Standards." CPP at 105.

No mere checklist, the IPs are a thought-out, integral part of the Commission's water quality management program approved and overseen by the EPA. Contrary to the District Court's ruling,[51] meeting the IPs standards is meaningful; it supports the approval of City's permit and the Commission's decision to grant the permit. Finally, the language of the 2010 IPs approved by the Commission and the EPA demonstrates that the Commission's water quality standards, and the procedures developed to implement the standards, are no mere checklists. The IPs provide:

- The "Antidegradation reviews under Tier 1 ***ensure*** that existing water quality uses are not impaired by increases in pollution loading." IPs at 56 (emphasis added).
- The "Antidegradation reviews under Tier 2 ***ensure*** that where water quality exceeds the normal range of fishable/swimmable criteria, such water quality will be maintained . . . ." IPs at 61 (emphasis added).

[51] *See* CR, DCTLR at 8.

In other words, the IPs were drafted to "ensure" that there will not be degradation, and it follows that applying the limits derived from following the IPs, as Ms. Murphy did, will prevent degradation.

TCEQ conducted a meaningful review of the permit using EPA approved IPs. The evidence in the record supports the TCEQ's conclusion that the permit will not degrade water quality. SOS failed to rebut this evidence, instead deciding to brush off the IP standards as a mere formality. As a result, SOS's request to reverse the Commission should have been denied. The District Court, in adopting SOS's characterization of the IPs as a mere checklist, failed to appreciate the significance of the IPs standards and its relationship with federal and state statutory requirements. This is error and must be reversed.

3. The Dissolved Oxygen analysis conducted by the ED and the City demonstrated that the Proposed Permit would satisfy federal and state legal and technical requirements for TPDES permitting.

The District Court erred by accepting SOS's contention that City's Permit impermissibly lowers Dissolved Oxygen (DO) levels and fails to satisfy Tier 2 antidegradation standards. 2SCR, DCTLR at 6. The District Court and SOS disagree with how the antidegradation standards were applied, disagree with the IPs (despite approval by the EPA), and

dismiss the results of the analysis conducted applying these Commission standards. *See* 2SCR, DCTLR at 8.

However, merely because SOS disagrees with the approach adopted by TCEQ and utilized by the ED, it does not mean that TCEQ erred in approving the City's TPDES Permit. Credible expert testimony was presented applying the procedures and standards called for under the Commission's IPs[52] and TSWQS, and this testimony supports the Commission's decision to grant the City's Permit. ED witness Ms. Murphy conducted much of the ED's analysis and described in her testimony the processes that ensure that water quality is maintained and DO level requirements are adequate:

> First, I verified that the discharge route is to Walnut Springs; then to the segment, Onion Creek in Segment 1427 of the Colorado River Basin. I then referenced Appendix A of the TSWQS to verify the designated uses assigned to Onion Creek, which are primary contact recreation, public water supply, aquifer protection, and high aquatic life use with a corresponding 5.0 mg/L dissolved oxygen.
>
> . . . .
>
> I looked at USGS maps provided by Dripping Springs in the application, satellite imagery on ARC GIS, and a site visit on February 19, 2016, to determine that Walnut Springs is intermittent. I made the determination that the Walnut

[52] Dissolved oxygen criteria, along with aquatic life attributes, are described beginning on page 14 of the 2010 IPs. *See* RR, AR Item 257 (IPs).

> Springs was intermittent with a minimal aquatic life use and corresponding dissolved oxygen criterion of 2.0 mg/L.
>
> . . . .
>
> I assessed Walnut Springs as intermittent and assigned a minimal aquatic life use with an associated dissolved oxygen criterion of 2.0 mg/L when water is present in the channel. According to Appendix A of the TSWQS, Onion Creek in Segment 1427 of the Colorado River Basin has the designated uses of primary contact recreation, public water supply, aquifer protection, and high aquatic life use with an associated dissolved oxygen criterion of 5.0 mg/L.

AR Item 255 (Murphy Prefiled) at 13, 15, and 27.[53] As can be seen from Ms. Murphy's testimony, the Commission's regulations require a specific, quantifiable DO level in order to comply with Chapter 307's surface water quality provisions. This approach is different than the measurements used for TP and TN under the antidegradation standards because TP and TN require a more qualitative, subjective approach.

Moreover, Courts have recognized the dual measurement system (Narrative/Subjective and Quantitative/Numeric) used by TCEQ in its oversight of water quality maintenance. *See Tex. Comm'n on Envtl. Quality v. City of Waco*, 413 S.W.3d 409, 412 n.3 (Tex. 2013). (TCEQ has defined "narrative" water quality standards as "qualitative, somewhat subjective assessments of 'too much,'" in contrast to "quantitative or

[53] *See also* RR, AR Item 255 (Murphy Prefiled) at 16–17, 25.

numeric measures."). "Narrative standards apply to parameters such as nutrients that are harder to quantify. Unlike many water-quality criteria . . . the variability of ecosystems makes developing a cause/effect relationship between nutrient concentrations and ecological factors more difficult to readily determine through testing. Hence, a narrative standard rather than a numeric standard is applied." *Wood v. Tex. Comm'n on Envtl. Quality*, No. 13-13-00189-CV, 2015 WL 1089492, at *5 (Tex. App.—Corpus Christi Mar. 5, 2015, no pet.).

In comparison to TP and TN measurements, Dissolved Oxygen (DO) is measured using the quantitative approach under the EPA-approved IPs[54] applicable in TPDES permit proceedings. As the Court in *Wood* recognized, the Commission's Implementation Procedures use "numerical data for elements that are easy to quantify, such as dissolved oxygen, total dissolved solids, sulfate, chloride, pH, temperature, toxic pollutants, and bacteria, among others." *Id.*

As Ms. Murphy testified, specific DO levels are provided in the TSWQS rules and appendices to ensure that the surface water quality

[54] EPA approved the 2010 IPs in July 2013. *See* RR, AR Item 255 (Murphy Prefiled) at 7.

standards are satisfied.[55] The City's proposed permit had to meet minimum levels of 2.0 mg/L in Walnut Springs (an unclassified water)[56] and 5.0 mg/L in Onion Creek.[57] The permit granted by TCEQ exceeds these standards and requires a minimum of 6.0 mg/L—satisfying the most stringent limit required by the TCEQ for receiving waters.[58]

After confirming the applicable DO levels under the TSWQS, the ED also conducted a modeling analysis to confirm that the DO levels will be maintained in the receiving water.[59] Ms. Murphy stated that James E. Michalk was the ED's water quality modeler for City's proposed permit.[60] The ED's model provides Mr. Michalk's assessment of the potential impacts of the proposed discharge upon dissolved oxygen in the receiving streams.[61] According to the ED modeling analysis, DO levels "will be maintained above the criteria established by the Standards

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[55] AR Folder B, Item 255 (Murphy Prefiled) at 9, 16, 28.

[56] AR Folder B, Item 255 (Murphy Prefiled) at 16.

[57] AR Folder B, Item 255 (Murphy Prefiled) at 16.

[58] AR Folder B, Item 223 (Miertschin Prefiled) at 23–24.

[59] *See* RR, AR Item 255 (Murphy Prefiled) at 17.

[60] RR, AR Item 255 (Murphy Prefiled) at 17 and 28; *see* AR Folder B, Item 223 (Miertschin Prefiled) at 13-14.

[61] RR, AR Item 223 (Miertschin Prefiled) at 13–14; RR, AR Item 225 (Michalk TCEQ Interoffice Memo).

Implementation Team for Walnut Springs Creek (2.0 mg/L) and Onion Creek (5.0 mg/L)."[62] The ED modeling analysis concluded that the draft permit's effluent limits comply with the requirements of the Colorado River Watershed Protection Rules and of the Edwards Aquifer Rules.[63]

Additional modeling provided in evidence by the City supports the Commission's decision to grant City's Permit. City witness Dr. Miertschin conducted a modeling analysis of DO levels confirming that the dissolved oxygen levels required under the TSWQS would be maintained.[64]

4. SOS presented a flawed case that failed to overcome the prima facie demonstration establishing that the draft permit meets all applicable legal and technical requirements.

The District Court erred in failing to apply the statutory and regulatory standards that articulate what must be shown to overcome the prima facie demonstration supporting the permit. SOS presented its own witnesses in its attempt to defeat City's proposed permit. However, the SOS witnesses failed to demonstrate that one or more Permit

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[62] RR, AR Item 225 (Michalk TCEQ Interoffice Memo).

[63] RR, AR Item 225 (Michalk TCEQ Interoffice Memo) (*citing* 30 Tex. Admin. Code ch. 311, Subch. E; 30 Tex. Admin. Code ch. 213, Subch. A).

[64] RR, AR Item 223 (Miertschin Prefiled) at 58.

provisions would violate a specifically applicable state or federal requirement. *See* Tex. Gov't Code § 2003.047(i-2). First, the testimony SOS witnesses presented was flawed. In addition to the testimonial shortcomings discussed below regarding dissolved oxygen, SOS's antidegradation analysis of nutrients failed to follow key required procedures and further fell short by failing to account for natural impacts.

SOS presented Dr. Nowlin, whose opinions on the increased loading of phosphorus are not reliable because one of the essential parts of his calculations relies on samples tested at the Aquatic Ecology Lab[65] which is not accredited by the National Environmental Laboratory Accreditation Program (NELAP).[66] However, TCEQ rules require that an environmental testing laboratory be accredited according to NELAP if the laboratory provides analytical data used for a Commission decision relating to a permit.[67] Dr. Nowlin's data from a non-accredited lab may not be relied upon by TCEQ in deciding whether to issue a permit, unless

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[65] RR, AR Item 286 (Tr. at 527, Nowlin Cross).

[66] RR, AR Item 286 (Tr. at 527, Nowlin Cross).

[67] 30 Tex. Admin. Code § 25.1.

certain exceptions apply.[68] As noted in the PFD, "[n]one of the exceptions apply to this case."[69]

Further, City's expert witness Dr. Paul Price testified that SOS witness Dr. Nowlin's calculation treated phosphorus, "as an inert substance, passing through the stream unaffected by any biological or physical process beyond hydraulic mixing and transport."[70] City's Dr. Price continued:

> This is not a proper calculation. Instead, phosphorus participates in complex biological and geochemical processes . . . . Geochemical processes are linked through sedimentation of detrital particles and suspended solids . . . and by precipitation of phosphates with calcium and magnesium carbonates, sulfates, and ferric oxides. These processes remove phosphorus from the water column and sequester it in stream sediments. Carbonate precipitation, in particular, has been cited as the reason that hill country streams exhibit uncommonly low levels of dissolved phosphorus.
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> . . . .
>
> [I]t is my opinion that the processes believed to be responsible for the uncommonly low phosphorus concentrations in hill country streams, including Onion Creek, will continue to function to remove phosphorus from the water column,

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[68] 30 Texas Admin. Code §§ 25.1, 25.6.

[69] PFD at 10.

[70] RR, AR Item 215 (Price Prefiled) at 13.

> mitigating to some extent the impacts of the additional nutrient load, and to buffer the aquatic community from major changes.

AR Item 215 (Price Prefiled) at 13–14. By failing to account for the phenomena described by Dr. Price, Dr. Nowlin's analysis is undermined and its evidentiary weight is reduced.

Additionally, SOS never established that the change it claims will happen in TP levels would violate an applicable law. There is no standard prohibiting an increase in phosphorus, per se. That simply is not the question addressed in a Tier 2 review, yet that is the focus of SOS's argument. In contrast with SOS's argument, the applicable standards for City's Permit involve a set limit based on a 30-day average as the minimum treatment level.[71] The rule's phosphorus limitation is satisfied in the Commission-approved permit because the permit actually includes a stricter limit than the strict limit already required by the rule designed to protect Onion Creek, 30 Tex. Admin. Code § 311.43.[72]

While SOS argues that the § 311.43 limits are not sufficient, the limits were the subject of notice and comment rulemaking under the

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[71] 30 Tex. Admin. Code § 311.43(a)(4).

[72] *See* Order at FOFs 32, 80–83, 87–88.

Administrative Procedure Act,[73] and have been vetted by the EPA as part of the draft permit. SOS chose to collaterally attack the rule and did not provide evidence that demonstrates that "one or more provisions in the draft permit violate a specifically applicable state or federal requirement" as required by Tex. Gov't Code § 2003.047(i-2) to overcome the case presented in support of the permit. The record evidence, including Dr. Price's testimony, supports granting the permit, and TCEQ genuinely engaged in reasoned decision-making when granting the permit which meets the limits found in the Commission's regulations.

Likewise, SOS fails to support with reliable testimony its contention that pollutant levels would increase too much under the permit. Dr. Ross's testimony is founded on questionable calculations. In contrast with the 36 years of data contained in the TCEQ database, Dr. Ross's analysis was unsupported—one of the critical data points for her analyses was a single sample event reported in a lengthy City of Austin report that was not in evidence.[74] The naked data points are found in her testimony but the narrative supporting the reliability of the data points

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[73] 30 Tex. Admin. Code § 20.3; *see* Tex. Gov't Code ch. 2001, subch. B.

[74] RR, AR Item 285 (Tr. at 479:17-21, Ross).

was not included, nor admitted in evidence. Ultimately, the laboratory data for the single sampling event was offered into evidence by the City and admitted at Ex. APP-18,[75] but not the explanatory report that discussed where the data was obtained and other background.[76] However, Dr. Ross testified that she had never seen the laboratory report on the data points she used and did not know whether the samples that that yielded the data points had been tested as required at a NELAP-accredited lab.[77] Despite not knowing the reliability of the testing that underlay the data points, Dr. Ross relied on the data, but not without further problems. There were discrepancies with Dr. Ross's use of the borrowed data points; City Witness Dr. Miertschin explained that the actual City of Austin data relied upon by Dr. Ross showed a value of 0.02 mg/L total phosphorus, not the 0.008 mg/L number used by Dr. Ross.[78]

Further, while Dr. Ross only relied on a single sampling event from the City of Austin, she had other samples available for use in her

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[75] RR, AR Item 245.

[76] RR, AR Item 286 (Tr. at 517:7 to 518:18, Ross).

[77] RR, AR Item 286 (Tr. at 517:18-20; 476:14-16); *see* 30 Tex. Admin. Code § 25.4(a)(l).

[78] RR, AR Item 286 (Tr. at 634:21 to 638:12, Miertschin).

calculations but declined to take advantage of that opportunity.[79] Despite its availability, Dr. Ross noted that the TCEQ data is higher than the secondary data she chose to use, so she opted not to use it.[80] The data she did decide to use was from a single sampling event data point and was either misunderstood or misrepresented.[81]

Under Judicial Review, the credibility of witnesses and weight of the evidence remains with the agency;[82] TCEQ genuinely engaged in reasoned decision-making when declining to rely upon SOS's proffered testimony and its Order is supported by substantial evidence in the Record. Accordingly, TCEQ's Order should be affirmed.

5. SOS failed to overcome the prima facie case in support of the proposed permit regarding antidegradation standards, including for dissolved oxygen (DO) levels.

To oppose the proposed permit, SOS presented three witnesses on the antidegradation issues. Two SOS witnesses, Dr. Nowlin and Dr.

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[79] RR, AR Item 285 (Tr. at 469:9-16, 474:6-10, 476:17 through 477:5, 480:9-12, Ross) (Dr. Ross admitting that in her calculations, she did not use sample results from City of Austin, SOS Witness Dr. Nowlin, or from the Applicant.).

[80] RR, AR Item 269 (Ross Prefiled) 20:7-10.

[81] *See* RR, AR Item 286 (Tr. at 634:21 to 638:12, Miertschin).

[82] *Central Power & Light Co. v. Public Util. Comm'n*, 36 S.W.3d 547, 561 (Tex. App.—Austin 2000, pet. denied); Tex. Gov't Code § 2001.174 ("[A] court may not substitute its judgment for the judgment of the state agency on the weight of the evidence on questions committed to agency discretion.")

Gabor, admitted to having no expertise regarding the antidegradation question.[83] SOS's third witness, Dr. Ross, attempted to show that the ED did not correctly apply the procedures to implement the standards, but used the wrong document. Dr. Ross's testimony applied 2012 IPs standards not used by TCEQ and not approved by the EPA.[84] As a result, Dr. Ross's testimony is not directly relevant. When weighing the evidence and the credibility of the witnesses, the ALJ stated that, "[w]hile SOS's experts are knowledgeable in their respective fields, their expertise does not extend to the applicable standards and rules related to wastewater permitting."[85] The ALJ continued, stating that "[r]ather than demonstrating that the applicable Commission rules or processes were violated, SOS's experts essentially used alternative methodologies to try to demonstrate potential problems that may result from the expected discharge under the proposed permit. However, their testimony

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[83] RR, AR Item 243 (Gabor Oral Deposition) at 19:12–17, 31:10–11; RR, AR Item 267 (Gabor Prefiled) at 12:10–17; RR, AR Item 242 (Nowlin Oral Deposition) at 16:19 – 73:15; RR, AR Item 275 (Nowlin Prefiled) at 16:28 – 17:7.

[84] RR, AR Item 269, (Ross Prefiled) at 25:15 –27:8, and fns. 24, 25, and 27.

[85] PFD at 6.

was frequently conclusory, speculative, and based upon limited and sometimes unreliable background sources."[86]

SOS's three witnesses also addressed the proposed permit's dissolved oxygen level requirement. Dr. Ross conceded that the Draft Permit's 6.0 mg/L DO level requirement was acceptable and had no criticism of the ED's modeling. While SOS's two other witnesses, Dr. Gabor and Dr. Nowlin, challenged the DO analysis undertaken by the ED, neither witness's testimony was sufficient to rebut the weight of the ED's DO analysis. SOS witness Dr. Gabor asserted that that dissolved oxygen "can drop" when total phosphorus exceeds .020–.025 mg/L,[87] but when asked to provide sources to support this contention, she did not.[88]

In contrast, the ED and City modeling showed that the dissolved oxygen levels would be within acceptable parameters.[89] Dr. Gabor's unsupported opinion does not overcome the ED's and City's cases supporting the proposed permit's DO limits. Likewise, SOS witness Dr.

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[86] PFD at 6.

[87] RR, AR Item 267 (Gabor prefiled) at 6:13–17.

[88] RR, AR Item 285 (Tr. at 414:20 to 417:4, Gabor.

[89] RR, AR Item 247 (Centeno Prefiled) at 15:14–19; RR, AR Item 255 (Murphy Prefiled) at 28:12–13; RR, AR Item 225 (Michalk memo); RR, AR Item 223 (Miertschin Prefiled) at 24–28.

Nowlin asserted that DO concentrations might drop below 2 mg/L but did not provide support for this statement.[90]

In Texas, expert opinion must be based on independently reliable data, not subjective opinion of facts. *Hanson v. Greystar Dev. & Const., LP*, 317 S.W.3d 850, 854 (Tex. App.—Ft. Worth 2010, pet. denied) (*citing TXI Transp. Co. v. Hughes*, 306 S.W.3d 230, 239–240 (Tex. 2010)). The expert must link his conclusions to the facts, explaining the basis of his assertions. *Bombardier Aero. Corp. v. SPEP Aircraft Holdings, LLC*, 572 S.W.3d 213, 223 (Tex. 2019). The basis of the witness's opinion, "and not the witness's qualifications or his bare opinions alone" is what can settle an issue as a matter of law. *Burrow v. Arce*, 997 S.W.2d 229, 235 (Tex. 1999). SOS's testimony shortcomings undermine its evidentiary weight as well as the witness in question's credibility.

In addition to challenging the ED's and City's analysis, SOS claimed in district court briefing that the Commission erred by collapsing the Tier 2 analysis into the Tier 1 analysis for DO. CR, SOS Plaintiff's Brief at 28–29. The District Court adopted this view. 2SCR, DCTLR at 6-7. However, SOS and the District Court lost sight of the plain language

[90] RR, AR Item 275 (Nowlin Prefiled) at 17.

of the Tier 2 standard that "existing uses must be maintained." 30 Tex. Admin. Code § 307.5(b)(2).

The Commission's FOF 90 acknowledges satisfaction of the Tier 2 requirement: "A Tier 2 review confirmed that no significant degradation of water quality is expected in Onion Creek, which has been identified as having high aquatic life uses, such that the existing uses will be maintained and protected."[91] Consistently, the rule's Tier 2 requirement states:

> No activities subject to regulatory action that would cause degradation of waters that exceed fishable/swimmable quality are allowed . . . .
>
> Degradation is defined as a lowering of water quality by more than a de minimis extent, ***but not to the extent that an existing use is impaired. Water quality sufficient to protect existing uses must be maintained.***"

30 Tex. Admin. Code § 307.5(b)(2) (emphasis added). SOS's may disagree with the standards adopted in TCEQ's rule, but this disagreement does not make the Commission's application of the rule erroneous. Applying the rule to the evidence, the PFD and TCEQ correctly found that DO will be maintained at concentrations that support a healthy aquatic life

[91] Order at FOF 90.

community.[92] The PFD and Commission further correctly found that no significant degradation of water quality is expected in Onion Creek, which has been identified as having high aquatic life uses, such that the existing uses will be maintained and protected.[93]

The Commission genuinely engaged in reasoned decision-making when adopting the ALJ's assessment of the credibility of the witness on the issue of antidegradation and of the weight of the evidence. Despite SOS's claims that TCEQ has misapplied the antidegradation standards, SOS did not successfully rebut the expert testimony presented by Ms. Murphy on behalf of the ED, nor did SOS prove up a prima facie case of its own for the alternative procedures and measures it sought to have used in a Tier 2 review. In contrast to SOS's three witnesses, ED's witness Lili Murphy presented a solid, credible analysis that complied with the approved IPs and the Commission's rules. Ultimately, "after considering the totality of the record," the ALJ found the testimony of the

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[92] Order at FOF 88.

[93] *Id.* at FOF 90; PFD at 25 ("So, ultimately, the issue is whether the evidence demonstrates more than a *de minimis* lowering of water quality. The ALJ concludes that SOS's evidence does not make this showing."); *see* RR, AR Item 255 (Murphy Prefiled) at 14 and 17; RR, AR Item 223 (Miertschin Prefiled) at 47–48.

ED's and the City's experts to be more compelling and reliable.[94] The ALJ noted in the PFD that "the City's and the ED's witnesses have extensive experience with the issues and analyses involved in this case, whereas SOS's experts lack that experience." *Id.* The ALJ explained that, "SOS's experts based much of their testimony not on their own experience, but on conclusions they drew from the reports and studies of others. Such is appropriate, but the persuasive value of SOS's testimony is outweighed by the site-specific evaluations and modeling done by the City's and the ED's experts." *Id.* at 6–7.

SOS was tasked in the contested case with rebutting the prima facie demonstration that the draft permit meets all state and federal legal and technical requirements, including maintaining water quality. However, SOS failed to raise a genuine suspicion that the quality of the receiving waters suffers degradation and the requirements would be not be met. SOS presented subjective opinion testimony where objective facts were necessary to rebut the case supporting the permit. Additionally, the Commission is the sole judge of the weight to be given to the evidence presented and the credibility of the witnesses. *Central Power & Light*

[94] PFD at 6.

Co. v. Public Util. Comm'n, 36 S.W.3d 547, 561 (Tex. App.—Austin 2000, pet. denied). As judged in the PFD and the Commission's decision, SOS failed to overcome the evidence and credible witness testimony presented by the City and the ED.

Moreover, a portion of SOS's case involved advocating for the use of stricter standards than those found in the Commission's rules. In seeking to have TCEQ utilize different standards, SOS became the moving party on this affirmative request, with the burden of persuasion that the standards it advocated should be used when evaluating the proposed TPDES permit rather than those found in Title 30 of the Texas Administrative Code. *See e.g. McCarty v. Texas Parks & Wildlife Dep't*, 919 S.W.2d 853, 854 (Tex. App.—Austin 1996, no writ) ("Agency rules are presumed valid, and the burden of proof is on the party challenging the rule."). SOS did not meet this burden and TCEQ did not err in declining to employ standards outside of its prior-approved regulations.

6. Case law from other states does not support SOS's interpretation of Tier 2 standards or establish that the Commission erred.

SOS and the District Court attempt to bolster their interpretation of the Tier 2 standards by citing to cases from other states. First, in

district court briefing, SOS cited to an Ohio case and stated: "The Ohio Supreme Court held invalid an identical interpretation of Tier 2 by its state agency,"[95] but this cannot be true because the Texas statute and the Ohio statute are significantly different. Ruling decades before the EPA approved the Texas 2010 IPs, the Ohio Court was interpreting a very different statute. The Ohio statute at issue in *Columbus & Franklin Cty. Metro. Park Distr.* includes a Tier 2 requirement that says nothing about a *de minimis* effect on water quality. Instead, the Ohio statute's Tier 2 provision stated, "Waters in which existing water quality is better than the criteria prescribed in these rules and exceeds those levels necessary to support propagation of fish, shellfish and wildlife and recreation in and on the water shall be maintained and protected." *Columbus & Franklin Cty. Metro Park Distr.*, 600 N.E.2d at 1053. Moreover, the Ohio court recognized that other states had different standards and approaches to the Tier 2 analysis (such as Oklahoma's "perceptible change" standard) which the Ohio court conceded would be consistent with federal statutory law. *Id.* at 1055 n.16. Thus, even the

[95] SOS's Plaintiff Brief at 29 (*citing Columbus & Franklin Cty. Metro. Park Distr. v. Shank*, 600 N.E.2d 1042 (Ohio 1992)).

case cited by SOS does not support a reversal of Commission's application or interpretation of its antidegradation standards.

Next, the District Court cited to a footnote in a Sixth Circuit case, *Kentucky Waterways All. v. Johnson*, 540 F.3d 466 (6th Cir. 2008), which describes the Tier II standard as protecting a water body's ability to maintain its level of quality above what is required to support its designated uses.[96] The District Court cites to this *Kentucky Waterways* footnote to support its assertion that the City and TCEQ "ignore the necessity of protecting this buffering, or assimilative, capacity of Onion Creek."[97] The District Court is simply wrong. Consistent with the *Kentucky Waterways* footnote, assimilative capacity is an environmental concept that applies to air and water; the U. S. Department of the Interior has defined Assimilative Capacity as: "an ecosystem's ability to repair itself by digesting, degrading, transforming, absorbing, or otherwise eliminating the pollutants placed in it. . . . . the assimilative capacity of a water body is usually viewed in relation to some water quality standard or level of service. In other words, assimilative capacity is the ability of

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[96] *See* CR, DCTLR at 7.

[97] CR, DCTLR at 7.

a water body to absorb a particular pollutant up to the point where certain detrimental effects are realized."[98] In the administrative proceeding, assimilative capacity was not ignored, it was give the treatment required for new discharges into a river or stream, which is distinguishable from the treatment for with other types of water bodies.[99] Comparison of the water quality with baseline water quality conditions from 1975 is an essential first step in antidegradation review under the IPs and was followed by ED witness Lily Murphy; in fact, recognition of background conditions is why she made a very stringent limit recommendation.[100] The IPs also distinguish between new and existing discharges but for both, the numeric criteria envision reservoirs, not rivers and streams. Moreover, the antidegradation protocol using numeric criteria is not a black and white test described in absolute terms: "New discharges that use 10% or greater of the existing assimilative

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[98] Natural Resource Damage Assessments—Type A Procedures, 61 Fed. Reg. 20560-01, 20599-20600, 1996 WL 225842 (May 7, 1996).

[99] *See, e.g.*, RR, AR Item 257 (IPs) at 26.

[100] RR, AR Item 255 (Murphy Prefiled) at 6; *see* RR, AR Item 257 (IPs) at 63; RR, AR Item 286 (Tr. at 619:15-21, Murphy Cross).

capacity *are not automatically presumed to constitute potential degradation* but will receive further evaluation."[101] (Emphasis added.)

Moreover, record evidence indicates that Onion Creek has enhanced assimilative abilities due to the nature of its surroundings and riverbed composition: "the processes believed to be responsible for the uncommonly low phosphorus concentrations in hill country streams, including Onion Creek, will continue to function to remove phosphorus from the water column, mitigating to some extent the impacts of the additional nutrient load, and to buffer the aquatic community from major changes."[102] TCEQ took into account the pre-discharge water quality as well as the water's ability to assimilate and has prevented degradation in satisfaction of Tier 2 requirements through the use of stringent limits within the permit.

Finally, the District Court and SOS outrageously compare the Commission's application of the unambiguous Tier 2 rule to the recent U.S. Supreme Court Clean Water Act case of *Cty. of Maui v. Hawaii*

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[101] RR, AR Item 257 (IPs) at 66.

[102] RR, AR Item 215 (Price Prefiled) at 13–14. Additionally, according to Dr. Price on page 14, a report relied upon by SOS witness Dr. Ross, the 2007 Mabe study, found that "hill country streams tended to maintain high aquatic life uses in spite of seemingly elevated levels of nutrients, focusing primarily on phosphorus."

Wildlife Fund, stating that TCEQ's position "opens a major loophole in the Act's mandate to protect and maintain the quality of our Nation's waters." 2SCR DCTLR at 7 (*citing* 140 S. Ct. 1462, 1474 (2020)). Yet again, the District Court is wrong. The Commission not only does not create a "loophole allowing easy evasion of the statutory provision's basic purposes," the Commission requires the applicant (the City) to undergo a rigorous permit review, including Tier 1 and Tier 2 antidegradation review, and places stringent limits as a condition of the permit.

The City's Permit is not in any way comparable to the facts presented in *Maui* where the authority was exempting the proposed permit from TPDES permitting altogether by finding that the discharge point which was into groundwater a short distance from the oceanfront was not actually a discharge from a point source into navigable waters. The Court noted that reading the permitting requirement not to apply "if there is any amount of groundwater between the end of the pipe and the edge of the navigable water," would allow absurd results such as placing the pipe back from the water's edge by a few yards to avoid the permitting requirement (i.e. easy evasion). *Maui,* 140 S. Ct. at 1473. No such interpretation is presented in this case, and any precedent set could not

be said to facilitate easy evasion of federal requirements. Instead, *Maui* supports the Commission's decision; *Maui* recognized that not all scenarios fit neatly within expected parameters, but a way can be found to apply permitting criteria. This is the expertise that courts have long recognized in agencies: "[W]e often pay particular attention to an agency's views in light of the agency's expertise in a given area, its knowledge gained through practical experience, and its familiarity with the interpretive demands of administrative need." *Maui*, 140 S. Ct. at 1474. In this case, the Commission's Order resulted from reasoned decision-making, applying the legal and technical requirements to the unique facts presented; it does not open the door to easy evasion of the law and should be given deference by the Court.

"The issue before us is, again, whether there is some basis in the record for the agency's decision that the proposed discharge is allowable under Texas's antidegradation rule." *Robertson Cty.: £Our Land, Our Lives (RCOLOL) v. Tex. Comm'n on Envtl. Quality*, No. 03-12-00801-CV, 2014 WL 3562756, at *9 (Tex. App.—Austin July 17, 2014, no pet.). In this case, the answer is clearly, yes, the record provides ample basis for

TCEQ's decision granting the permit. For this reason, the Court should uphold the Commission's Order and reverse the District Court.

7. The Commission did not err in taking into account the relative strictness of the Permit's limits.

The District Court erred by accepting SOS's argument that TCEQ acted arbitrarily in basing its Permit decision on what SOS claims are irrelevant factors or "non-statutory criteria—the stringency of the permit relative to other TPDES permits." CR, SOS Plaintiff's Brief at 30–31; *see* 2SCR, DCTLR at 9-10. The District Court and SOS are wrong and mischaracterize the Commission's decision. The stringency of limits incorporated in City's Permit is noted in several findings of fact within the Commission's Order: FOFs 41, 47–49, 52, 75, and 92.[103] However, none of these findings suggest that "the stringency of the permit relative to other TPDES permits" was the deciding factor. Rather, the stringency of the limits speaks to how the final draft permit will be protective of human and animal life, and to the care taken by TCEQ to secure the quality of the receiving waters. Additionally, comparisons to other

[103] Evidence supports these findings. *See* RR, AR Item 247 (Centeno Prefiled) at 14, 15, and 20.

permits was appropriate under the IPs. The site-specific screening factors within the IPs include "consistency with similar permits."[104]

Further, merely because TCEQ took note of the relative stringency of the limits in general terms does not mean that fundamental factors were not considered and utilized. TCEQ acted reasonably when setting limits within the City's permit that ultimately stand out as some of the strictest in the state. In fact, the permit requirements approved by TCEQ for the City's Permit include a rarely required total nitrogen limit. ED witness Mr. Centeno testified that including a total nitrogen effluent limit was uncommon for "discharge into freshwater water bodies, and it is exceedingly uncommon to include in combination with a total phosphorus limit for discharges into any water body in the state (freshwater or saltwater)."[105]

Contrary to SOS's contentions, TCEQ engaged in rational decision-making when granting the City's Permit. Accordingly, the Court should affirm Commission's Order.

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[104] RR, AR Item 257 (IPs) at 39.

[105] RR, AR Item 247 (Centeno Prefiled) at 15.

II. The Commission Acted Reasonably, Based on Record Evidence When Granting City's Permit that complies with Tier 1 Antidegradation Standards.

The Commission's anti-degradation policy set out in 30 Tex. Admin. Code § 307.5(b)(1) requires that under Tier 1 review, "[e]xisting uses and water quality sufficient to protect those existing uses must be maintained . . . . ." SOS argues that the Tier 1 review was not properly conducted by the ED and that the permitted discharge will violate Tier 1 standards because the Permit is not sufficiently protective of the existing species who live in the low nutrient conditions of Onion Creek. However, evidence was presented that the Permit's terms and limits sufficiently protect the existing species, including the sensitive, endangered salamanders. Much of the evidence that Tier 1 standards were satisfied was developed through the Commission's permit processing evaluation and procedures– this process is substantial. Indeed, by rule, many of the resulting documents establish the prima facie demonstration that all state and federal legal and technical requirements are met. *See* 30 Tex. Admin. Code § 80.17, 80.117(c)(1), 80.118(c).

Following the Commission's permit processing procedures, the City's TPDES permit application went through a rigorous technical

review to ensure that the draft permit would be protective of surface water quality and aquatic life.[106] The ED's technical review process involved DO modeling, a dissolved solids screening, and a nutrient screening.[107] ED witness Ms. Murphy testified that the technical review process used both numeric and narrative criteria: "Assessment of the uses of receiving waters have associated numeric and narrative criteria to protect water quality, such as primary contact recreation and public water supply to protect human health, and aquatic life use to protect the environment."[108] Ms. Murphy further explained that the "Tier 1 antidegradation review is the process of determining if a proposed new or amended discharge will violate the numerical and narrative criteria and impair an existing use." *Id.*

Further, the criteria associated with a receiving water's existing use are not used in isolation. The nutrient screening procedures in the 2010 IPs are the basis for the antidegradation review for nutrients, but to assess the local effects of the proposed discharge under the TSWQS,

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[106] RR, AR Item 37 (ED Response) at 3.

[107] RR, AR Item 37 (ED Response) at 3.

[108] RR, AR Item 255 (Murphy Prefiled) at 12.

an evaluation of site-specific screening factors was conducted by the ED to assess eutrophication potential in Onion Creek.[109]

Additionally, in response to the EPA's question of whether TCEQ properly applied the Tier 1 and Tier 2 Antidegradation Rules,[110] the ED confirmed that it considered and rated: the size of discharge, instream dilution, stream substrate, stream depth, water clarity, presence of aquatic vegetation, shading, streamflow characteristics, presence of on-channel impoundments and pools, and consistency with other permits.[111] As the ED explained: "The individual screening factors establish the basis for an overall 'weight-of-evidence' assessment to identify the need for a nutrient effluent limit."[112]

The ED did not simply apply standards set out by rule. Instead, the ED reviewed the applicable regulatory standards and its own nutrient screening results. The ED also referenced how the standards

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[109] RR, AR Item 37 (ED Response) at 2.

[110] RR, AR Item 33 (Initial Objection of Draft Permit).

[111] Although algae was thoroughly discussed in the Tier 1 antidegradation review, it was not the only issue. *See* RR, AR Item 255 (Murphy Prefiled) at 29–30.

[112] RR, AR Item 255 (Murphy Prefiled) at 29–30.

had been applied to another permit (WQ0014293001) within the same county and watershed.

The ED's response to EPA satisfied the federal agency that a proper review had been conducted applying the regulatory standards.[113] In contrast with SOS's emphasis on trophic status, trophic status was never indicated by the EPA as a required factor of review, either in its objections or in the withdrawal of objections. The only trophic status discussion recorded during EPA's review was by the ED noting in its response that evaluation of site-specific screening factors was conducted to assess eutrophication potential in Onion Creek.[114] Based on TCEQ's responsive letter, EPA issued a "Withdrawal of Objection" by letter dated June 29, 2017.[115] In addition to explaining how its initial concerns have been satisfied, the EPA noted additional benefits of the proposed permit, including that "this facility will allow for greater oversight of pollutants, nutrients. etc., entering into Onion Creek than individual septic systems."[116] The EPA's letter also noted, "[w]ith the significant amount

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[113] RR, AR Item 40 (EPA Withdrawal of Objection).

[114] *See* RR, AR Item 37 (ED Response) at 2.

[115] RR, AR Item 40 (EPA Withdrawal of Objection).

[116] *Id.*

of population growth in this area, EPA believes having a WWTF is necessary to maintain the high-quality waters in Onion Creek."[117] As seen in EPA's initial concerns and its subsequent withdrawal of objections, the EPA spent time considering the very issues SOS assert. Ultimately, the EPA's concerns were satisfied, including those related to Tier 1, and the ED recommended granting the Permit. The Commission's decision that Tier 1 antidegradation review was properly conducted and the proposed permit met the Tier 1 standards was not made in error.

Moreover, while the District Court states that the Commission's decision is not founded upon a proper Tier 1 review,[118] SOS failed to present a witness with reliable testimony on what the antidegradation standard Tier 1 review calls for under the rules. While SOS did present three witnesses, Dr. Nowlin, Dr. Gabor, and Dr. Ross, none applied the 2010 IPs approved by the EPA, and two of these witnesses (Dr. Nowlin and Dr. Gabor) admitted to having no expertise with regard to the antidegradation standards.[119]

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[117] *Id.* at 3.

[118] CR, DCTLR at 8.

[119] RR, AR Item 267 (Gabor Prefiled) at 12; AR Folder B, Item 243 (Gabor Deposition) at 19 and 31; AR Folder B, Item 275 (Nowlin Prefiled) at 17:6–7; AR B, Doc. 242 at 16:19–23 and 73:1–15 (Nowlin Deposition).

SOS's third witness also provided unreliable testimony. Dr. Ross attempted to show how the TCEQ did not correctly apply antidegradation procedures by referring to a version of the IPs not approved by the EPA and not used by TCEQ.[120] Consequently, Dr. Ross's testimony is not reliable with regard to applying antidegradation procedures, including for Tier 1.

Dr. Ross's testimony focuses on changes in trophic status due to "boundary crossing" but the oligotrophic-mesotrophic boundary used by Dr. Ross is not found in Texas regulations. "TCEQ does not have any of these stipulated trophic boundary lines that would apply to this situation."[121] During the hearing on the merits before the ALJ, SOS witness Dr. Ross acknowledged that the trophic boundaries he used are not standards, rules, or regulations but are instead "guidelines,"[122] "pieces of information,"[123] or "starting points"[124] for states to consider

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[120] *See* RR, AR Item 269 (Ross Prefiled) at 25–27; RR, AR Item 255 (Murphy Prefiled) at 7; RR, AR Item 286 (Tr. At 498:6–25, Ross).

[121] R, AR Item 286 (Tr., at 62, Miertschin Live Rebuttal).

[122] RR, AR Item 285 (Tr. at 483:23–484:4, Ross)

[123] RR, AR Item 285 (Tr. at 485:20–21).

[124] RR, AR Item 285 (Tr. at 485:17–20.

when setting water quality standards.[125] Further, regarding trophic status, the ALJ noted that the categorizations were merely simple delineations in order to divide streams into three equal groups.[126] Ultimately, Dr. Ross and SOS's over-value of trophic status in water quality review is not based upon applicable standards or rules and does not provide a basis for finding error in the Commission's decision.

Further, SOS did not provide evidence that crossing from one trophic status into the another is itself significant or that any specific thing will be threatened by such a change. The top end of one trophic category may well be almost indistinguishable from the bottom of the next since the categories were determined simply by creating three equally sized groupings; it was not an attempt to correlate a particular measurement to a particular category.[127]

With no correlation between category and measurement, being in a particular category does not make it more likely that an existing use would be affected. SOS failed to raise a genuine suspicion that if granted,

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[125] *See* RR, AR Item 285 (Tr. at 483:10–485:20, Ross).

[126] PFD at 27.

[127] *See* RR, AR Item 286 (Tr. at 628 l.9–629 l.14, Miertschin Live Rebuttal).

the City's permit would violate Tier 1 antidegradation standards. The Commission's decision granting the permit and finding that Tier 1 was satisfied is supported by record evidence, including the City's and the ED's prima facie demonstration. Accordingly, the Court should affirm the Commission's decision.

II. The Commission's conclusion related to public notice is reasonable and supported by substantial evidence.

The District Court makes three observations before concluding in the letter ruling that the notice provided was not "legally adequate" and that the Order, with regard to notice, "is not reasonably supported by substantial evidence considering the record as a whole:"

- The three notices provided did not include the required description of the discharge point;
- The discharge point is "nowhere near the treatment plant;"
- US Fish and Wildlife Service could not tell where the site was and needed more information than published.

2SCR, DCTLR at 10-11. While each of these reasonings are flawed, the overriding error committed by the District Court is the failure to recognize and apply the change in the law with regard to the establishment of City's case. As discussed earlier, Tex. Gov't Code § 2003.047(i-1)(1) states that certain documents (including the notice and supporting affidavits) "establish[ ] a prima facie demonstration that the

draft permit *meets all* state and federal *legal* and technical *requirements*.[128] The District Court's statement that the Order's conclusion on notice "is not reasonably supported by substantial evidence considering the record as a whole" is at odds with the statute that provides otherwise. By law, enough evidence (i.e. more than a scintilla) has been provided to support granting the permit standing alone. Whether or not such a demonstration was overcome by other record evidence is not relevant to the question presented on judicial review under Tex. Gov't Code § 2001.174: Whether there exists somewhere in the record as a whole some evidence (more than a scintilla) that supports the Commission's finding. We know with certainty that there was because § 2003.047(i-1) provides that the cited documents establish a prima facie demonstration that the notice requirement is met. Evidence cannot simultaneously be sufficient to support Applicant's case on one hand and be less than a scintilla or constitute "no evidence" to support the Order on another.

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[128] (Emphasis added.); 30 Tex. Admin. Code § 80.118(a)(1)-(6),(c); *see* 30 Tex. Admin. Code § 80.17(c).

Likewise, the District Court's conclusion that the notice was not "legally adequate" was not accompanied by any explanation as to how SOS satisfied the statutory requirements for rebutting the presumption that the notice satisfied all legal requirements: "A party may rebut a demonstration under Subsection (i-1) by *presenting evidence* that demonstrates that one or more provisions in the draft permit violate a specifically applicable state or federal requirement."[129] No such presentation was made.

In contrast, record evidence supports the Commission's conclusion that the City substantially complied with all applicable notice requirements.[130] For TPDES permits, Chapter 39 of the Commission's rules contemplate notice at three distinct points in the permitting process: when the application is received, NORI; when the draft permit is issued, NAPD and notice of Public Meeting; and when an application is referred to SOAH for a contested case hearing, NOH.[131] The City provided each of these notices in accordance with the Commission's rules;

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[129] Tex. Gov't Code § 2003.047 (i-2) (emphasis added).

[130] Order at COL 21.

[131] 30 Tex. Admin. Code §§ 39.551(b),(c),(f), 55.154(d).

copies of the notices are included in the evidentiary record and are part of the prima facie demonstration that the proposed permit meets all state and federal legal and technical requirements.[132]

The purpose of notice is to apprise interested persons that their interests may be at risk. *See Chocolate Bayou Water Co. & Sand Supp. v. Tex. Nat. Res. Conserv. Comm'n*, 124 S.W.3d 844, 850 (Tex. App.—Austin, 2003, pet. denied). Commensurate with this purpose, the first notice (NORI) must include "a brief description of the location and nature of the proposed activity."[133] The notice itself is not intended or required to provide specifics of an application. *Chocolate Bayou Water Co.* 124 S.W.3d at 851. The specifics are in the application, which is made available to inquiring persons. *Id.;* 30 Tex. Admin. Code § 39.405(g).

The record evidence demonstrates that the City complied with the notice requirements. Through this earliest of required notices, the public was provided with the information needed to understand whether their interests might be affected and that there exists an opportunity to participate in the permitting process. *See* 33 U.S.C. § 1251(e); *Chocolate*

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[132] RR, AR Items 174–176 and Item 177 at Tab A; *see* 30 Tex. Admin. Code §§ 80.17(c)(1), 80.118(a)(5),(c).

[133] 30 Tex. Admin. Code § 39.411(b)(3).

Bayou Water Co. 124 S.W.3d at 850. The NORI provided the address of the treatment plant which is on a public road, Ranch Road 150 in Dripping Springs, Hays County, Texas, and clearly stated that "[t]he discharge route is from the plant site via pipe to Walnut Springs, thence to Onion Creek." From this statement, a person can learn that the piped discharge is released into Walnut Springs and from there, will continue to Onion Creek. SOS contends, and the District Court wrongly accepted, that this is not specific enough to put a potentially affected person on notice.[134] But this assertion ignores the fact that any "potentially affected" person would be a local person, either familiar with the area or with the ability to ask those close by where Walnut Springs, Onion Creek, or Ranch Road 150 are located.

Indeed, the Commission's notice rules presume that the target audience for notice is local persons; notice is required to be published in local newspapers and available in a public place.[135] Whether someone working elsewhere would be able to locate noticed sites is not the relevant inquiry. However, even if it were, the United States Geological Survey

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[134] CR, DCTLR at 10-11.

[135] 30 Tex. Admin. Code §§ 39.405(g); 39.551(f)(2).

(USGS) identifies Walnut Springs on the official map of the area and could be referenced. The record evidence shows that Walnut Springs is a very short creek running from the namesake springs to Onion Creek.[136] Walnut Springs's short length (approximately 1/2 mile) and its intersection with Onion Creek (which is also mentioned) means that there is not the same need for further description as can be the case with larger watercourses. Further, SOS provided no evidence that the information provided was too vague or could mislead the public.

Likewise, the two subsequent notices, the NAPD and the NOH, require text that includes, "a *general* description of the location of each existing or proposed discharge point and the name of the receiving water."[137] The published NAPD and NOH contained the following description: "The treated effluent will be discharged to Walnut Springs, thence to Onion Creek in Segment No. 1427 of the Colorado River Basin."[138] Again, Walnut Springs's short length and close proximity to another named watercourse means that there is not the same need for

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[136] *See* RR, AR, Item 177 at pdf pp. 669 and 691; *see also* RR, AR Item 136 (Applicant's Response to Motion to Dismiss) at 6.

[137] 30 Tex. Admin. Code § 39.551(c)(4)(B), (f)(4)(B) (emphasis added).

[138] RR, AR Items 174 and 175 (NOH and NAPD); RR, AR Item 177 at Tab A.

further description of the location as there would be if Walnut Springs was a larger water course. Additionally, in these two notices, the particular segment of Onion Creek was identified. By reading the entirety of either of these notices, a person would know that the discharge is occurring in Dripping Springs, Hays County, Texas and from a treatment plant located on Ranch Road 150; will enter the water at Walnut Springs; and affects Onion Creek in Segment 1427 where it intersects with Walnut Springs. Considering the evidence presented, including the prima facie demonstration, TCEQ found that the notices satisfied the "general description" required by rule. The Commission's Order concluding that City has substantially complied with notice requirements was reasonable and should be affirmed.

CONCLUSION & PRAYER

The permit proposed by the City satisfies each regulatory requirement and promotes the maintenance of water quality through its terms. Affected persons participated and helped shape the terms of the permit. Based upon the evidence presented, the Commission acted reasonably in granting the City's Permit.

For these reasons, TCEQ respectfully prays that the Court reverse the District Court's judgment and render judgment affirming the TCEQ's Order in all respects. TCEQ further prays for any such other and further relief to which it may be justly entitled.

Respectfully submitted,

KEN PAXTON
Attorney General of Texas

BRENT WEBSTER
First Assistant Attorney General

GRANT DORFMAN
Deputy First Assistant Attorney General

SHAWN COWLES
Deputy Attorney General for Civil Litigation

PRISCILLA M. HUBENAK
Chief, Environmental Protection Division

/s/ Sara J. Ferris
SARA J. FERRIS
Assistant Attorney General
State Bar No. 50511915
Sara.Ferris@oag.texas.gov

ERIN SNODY
Assistant Attorney General
State Bar No. 24093056
Erin.Snody@oag.texas.gov

Office of the Attorney General
Environmental Protection Division
P.O. Box 12548, MC-066
Austin, Texas 78711-2548
(512) 475-4026
(512) 320-0911 (Fax)

ATTORNEYS FOR THE
TEXAS COMMISSION ON
ENVIRONMENTAL QUALITY

Certificate of Compliance

I certify that Brief of Appellant, Texas Commission on Environmental Quality contains 14,897 words and therefore complies with the word limit found in Tex. R. App. P. 9.4(i)(2)(B).

/s/ Sara J. Ferris
SARA J. FERRIS

Certificate of Service

I certify that the Brief of Appellant, Texas Commission on Environmental Quality was electronically filed with the Clerk of the Court using the electronic case filing system of the Court, and that a true and correct copy of the Brief of Appellant, Texas Commission on Environmental Quality was served upon counsel for each party of record, listed below, by electronic service on this 22nd day of March 2021.

William G. Bunch
Kelly D. Davis
SAVE OUR SPRINGS ALLIANCE
4701 Westgate Blvd., D-401
Austin, TX 78745
bill@sosalliance.org
kelly@sosalliance.org
Attorneys for Appellee Save Our Springs Alliance

David Tuckfield
THE AL LAW GROUP, PLLC
12400 Highway 71 West, Suite 350-150
Austin, TX 78738
david@allawgp.com

Doug Alexander
ALEXANDER DUBOSE & JEFFERSON LLP
515 Congress Avenue, Suite 2350
Austin, TX 78701-3562
dalexander@adjtlaw.com
Attorneys for Appellant City of Dripping Springs

/s/ Sara J. Ferris
SARA J. FERRIS

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